Presidential Elements in Government

The President of Romania, Or: The Slippery Slope of a Political System

Elena Simina Tănăsescu*

Directly elected, but in constitutional terms not the central authority of the Romanian political system – A 'trailblazer' role in parliamentary elections – Political neutrality constitutionally required, but hard to realise in practice – Comparison with the French Presidency – Limited powers making the President in theory 'a colossus with clay feet' – Ambivalent relationships with Parliament and Government – Gap between the constitutional and the real powers on account of 'active' Presidents – A hard-to-qualify political system

Preliminary remarks

According to the Constitution of Romania, in force since 8 December 1991 and amended following a referendum on 18 and 19 October 2003, President and Parliament have equal legitimacy. This represents the first new institutional setting for the Romanian modern state since its establishment through the union of the two Romanian kingdoms, Wallachia and Moldavia, in 1859. At that time, the same person succeeded in being elected Head of State (*domnitor*) by the General Estates of both kingdoms, which included people from all social strata, while the legislative assembly was exclusively made up of the representatives of the upper and middle classes. Subsequent to this first experiment, the heads of the Romanian state would be either monarchs,[1] or Presidents elected by Parliament.[2]

* Professor at the Law School of the University of Bucharest; Director of the Center of Constitutional Law and Political Institutions.

[1] The forced resignation on 1 May 1864 of the *domnitor* made it possible for the Romanians to entrust their throne to a foreign prince who pushed for the adoption of a Constitutional Pact in 1866. However, the head of State continued to be called *domn* until 1881, when Romania was proclaimed a kingdom. It was only in 1884 that this state of affairs was enshrined in an amended Constitution.

[2] Law No. 363 of 30 Dec. 1947 abolished the monarchy in Romania and established the Republic, headed by a *Presidium*, playing the part of a collegiate head of State. After 1974, the head of State became a one-person institution, appointed by a unicameral Parliament (The Grand National Assembly).

European Constitutional Law Review, 4: 64–97, 2008
© 2008 T·M·C·Asser Press and Contributors
doi:10.1017/S1574019608000643

https://doi.org/10.1017/S1574019608000643 Published online by Cambridge University Press

The tribulations of the communist epoch should have made Romanians more cautious about a President who is too powerful in comparison to other State authorities, and the choice of the law-makers in terms of 'institutional design' is certainly the embodiment of this caveat. In order to prevent dictatorship, the drafters of the 1991 Constitution established a strong Parliament with equal legitimacy alongside the President. In the words of one of the drafters of the Constitution, the so-called 'semi-presidential' political system was not chosen 'to facilitate totalitarianism, but rather quite the contrary.'[3]

The direct legitimacy of the Head of State, however, was perceived by the members of Parliament, who also formed the Constitutional Assembly, as an imminent threat to their own authority, even to their own legitimacy. Although the Articles of the draft Constitution concerning the President were inspired by those in the French Constitution of 1958 as amended in 1962, the debates in the Constitutional Assembly took a completely different approach. The members of the Assembly put in all necessary efforts, and went even further, to reduce the powers of the Head of State and keep Parliament at the forefront of the political arena. Consequently, for the exercise of most of his powers, the Head of State is dependent on other state authorities. Moreover, every function granted to the President of Romania has been the subject of fierce debates and the overall result points to a Presidency having the role of a *moderator*, or a *regulator*, rather than of a strong institution with important decision-making powers and an active role to play in the State.

This picture was reinforced by the constitutional amendment of 2003: instead of gaining authority or importance, the President of Romania was faced with even more legal constraints than before, as some of his functions were restrictively defined in exchange for nothing more than political neutrality, which had already been there right from the start. Against this background, the Romanian political developments, particularly after the 2004 elections, show a strong power struggle between a President constantly trying to expand his limited powers and a Parliament or a Government fighting to retain whatever discretion there might be available to them in the Constitution. The lack of precision of various constitutional provisions, coupled with strong personalities in the political arena, made it so that impeachment, referenda and Government reshufflings became the other face of normality in today's Romania, all against a more general background of constant strengthening of the executive at the expense of the legislature.

[3] F.B. Vasilescu, in *Geneza Constituției României 1991* [Genesis of the Romanian Constitution – The works of the Constitutional Assembly] (Monitorul Oficial 1998) p. 511 et seq. The debates that took place in the Constitutional Assembly are extremely informative in this respect, as they accurately reflect the fear of members of the Convention that the president might acquire too great a legitimacy.

https://doi.org/10.1017/S1574019608000643 Published online by Cambridge University Press

Beyond the regulatory capacity of the basic law of the State, the 'living constitution' ensures that the President is the authority personifying the State. He has enormous leverage in terms of his direct election and status, but this is not sufficient to make him the central institutional authority of the system. The main cause for the ambiguity of the Romanian system may very well lie in the ambivalent constitutional relationships that the President must develop with other State authorities, particularly with Parliament and the Government. In fact, after the adoption of the Constitution of 1991, it seems difficult to clearly qualify the political system in Romania: is it a semi-presidential, or even a semi-parliamentary one, as had been the design of its founding fathers,[4] or is it a semi-presidential system with presidential tendencies, which seems to be the path it has followed recently?

Election and status of the President

There is a direct causal link between the manner of election and the status of the President of Romania. However, if one puts it in other terms, this causal link becomes less evident: the relation between the legitimacy resulting from direct election and the political neutrality required by the Constitution seems less obvious. If the head of State is a directly representative authority, then he should represent the entirety of the Romanian people and not only portions of the constituents; however, his mode of election presupposes a clear and definite political commitment on his side. Despite heated debates on this issue in 1991 in the Constitutional Assembly, the constitutional framework has remained untouched and without further clarifications.

Direct legitimacy

According to Article 81 of the Constitution, the President of Romania must be elected by individual direct suffrage. If one of the candidates succeeds in obtaining the majority of the votes of those registered on the electoral lists, a single round is sufficient. If this condition is not met, a second round must be organised for the two candidates who ended at the top in the first round. The candidate who obtains the majority in the second round becomes President.

Impossibility of cumulating more than two terms of office

In the hope of avoiding too powerful a President, from a political point of view, and trying to hinder the establishment of a potential 'republican monarchy', as has happened in other settings, the Constitution of 1991 introduced a limitation

[4] F.B. Vasilescu, *see supra* n. 3.

https://doi.org/10.1017/S1574019608000643 Published online by Cambridge University Press

on the total number of presidential mandates to be accepted by one single person for the first time in Romanian law: no one can hold more than two terms of office, whether consecutive or not.

This limitation was the object of a stormy debate during the elections of 1996, when the President at the time (Mr. Iliescu) sought re-election. According to certain calculations in the referral to the Constitutional Court,[5] Iliescu had already completed two presidential terms of office,[6] whereas others argued that he was already in his fourth.[7] The Constitutional Court made a different calculation, according to which the Constitution could not be applied to cases occurring before its entry into force, in keeping with the principle of non-retroactive operation of laws. The Constitutional Court's finding that Iliescu had not completed his first term of office as President under the Constitution of 1991 until after the 1992 elections allowed him to take part in the elections of 1996.[8] Even if Iliescu failed to win at that moment, the precedent would favour him in the elections of 2000.[9]

Impact of the presidential term of office on parliamentary elections

Before the constitutional revision of 2003, the term of office of the Head of State had been identical to that of Parliament. This explains why, in practice, 'cohabitation' between a President and a parliamentary assembly of different political orientations at that time was inconceivable. Since members of Parliament are elected on their party lists and via a system of proportional representation, the link established between them and their constituents is not as obvious as the one between the President and the people, since the President is elected directly by the entire population. That is why the tendency of the constituents is to place a lot more

[5] According to Art. 146 of the Constitution, the Constitutional Court must 'safeguard the observance of the procedure to elect the President of Romania and to confirm the outcome of the elections'.

[6] The first mandate would have been the one he obtained in the elections organised in May 1990, before the entry into force of the Constitution, whereas the second would have been the one exercised between 1992 and 1996.

[7] According to this calculation, all the important political stages that followed the events of Dec. 1989 were taken into consideration as terms of office, and so the last mandate was the one after the entry into force of the Constitution (1992-1996).

[8] Ruling No. 1 of 1996, *OJ* No. 216, 11 Sept. 1996. Basically, the court says there is a difference between the concept of 'mandate of President' as regulated by the Constitution of 1991 and the mere notion of 'President of Romania', which could be identified even before 1989. That is the reason why the limitation to maximum two mandates refers only to situations which occurred after the coming into force of the Constitution.

[9] Which he managed to win, with a wide margin, in a second round, when he competed against Mr. Vadim Tudor, leader of 'Greater Romania', an extreme right-wing party in the Romanian political arena.

https://doi.org/10.1017/S1574019608000643 Published online by Cambridge University Press

emphasis on presidential elections than on parliamentary ones. Moreover, as the dates of the two elections have always been very close, charismatic Presidents were always in the position to play the role of a 'trailblazer' for their own party or coalition. Such was the situation in 1992 and 2000, when President Iliescu had supported the social-democrats[10] (or the various electoral coalitions they had concluded) in order for them to get relative but comfortable majorities in Parliament. However, the political change of 1996 was so fervently desired by the population that it is hard to say whether the Democratic Convention of Romania[11] needed the help of newly elected President Constantinescu to win the elections.

However, the most empirical proof of the 'trailblazer' role that can be played by a charismatic President was to be seen in the government formation of 2004. In the second round of elections for the Presidency, the former Prime Minister of the Social-Democrat Party (PSD), Adrian Năstase, opposed the former Mayor of Bucharest, Traian Băsescu, a candidate from the Democrat Party (PD) representing a 'centre coalition' (the 'Alliance for Justice and Truth') together with the National Liberal Party (PNL). Băsescu was elected President, which was a considerable success as he had not been a candidate at the beginning of the election campaign.[12] The outcome of the parliamentary elections which had taken place two weeks before the presidential elections had been quite ambiguous: the relative majority (132 deputies and 57 senators) was in favour of a government coalition made up of the Social-Democrat Party (PSD) and the Humanistic Party,[13] but

[10] This political party changed name several times and experienced several internal factions or regroupings with other political parties. During the elections of 1992 its name was the Democratic Front for National Salvation (FDSN), then it became the Party of Social Democracy in Romania (PDSR) during the elections of 1996 and 2000, and since 2004 it has been the Social Democrat Party (PSD).

[11] This is the name of a coalition of political parties and civic groups, established in Nov. 1991 and dissolved in 2000, following the disastrous results it obtained in the general and presidential elections. It was founded by the so-called 'historical' parties of Romania – the National Liberal Party (PNL) and the Christian Democratic National Peasant Party (PNTCD) – with the support of a whole plethora of smaller political parties. Shortly before the elections of 1992, the Democratic Convention received a boost from the National Liberal Party–Democratic Convention, the National Liberal Party–youth section and the Green Federation of Romania. The move to unite the political parties of liberal extraction, which gave birth to the current National Liberal Party (PNL), began during the Parliament term of 1996-2000 and ended only after the disintegration of the Democratic Convention.

[12] After having held various governmental offices, Traian Băsescu was elected mayor of Bucharest in 2000 and confirmed in this position in the summer of 2004. After he had promised the inhabitants of Bucharest that he 'would not relinquish them for a better job', the sudden withdrawal of Theodor Stolojan from the presidential race caused Traian Băsescu to become a presidential candidate. He won the second round of elections with a majority of 5,126,794 ballots in a turnout of 10,112,262 at the polls.

[13] The Humanistic Party of Romania (PUR) changed its name in this parliamentary term into Conservative Party (PC). Before the 2004 elections it had signed a coalition with the PSD, but it

https://doi.org/10.1017/S1574019608000643 Published online by Cambridge University Press

only a coalition made up of the PNL and the PD (65 deputies and 29 senators for the PNL and 47 deputies and 20 senators for the PD) was able to form a government[14] as it joined ranks with the Democratic Union of the Hungarians of Romania (UDMR), with its 22 deputies and 10 senators, and with a small number of the deputies of the national minorities (18 seats earmarked for those ethnicities that each nominate a candidate in parliamentary elections). A minority Government composed of these parties would have never received the confidence of Parliament if it had not been for the 'trailblazer' president Băsescu.

In order to separate presidential from parliamentary elections, and, eventually, to put an end to a practice which was not un-constitutional but which, politically, was no longer desired by the political elite, the Constitutional revision of 2003 established a 5-year term of office for the President and preserved the 4-year term of office for parliamentarians. Certain members[15] of the technical committee for the drafting of the Constitution defended this change as necessary in light of the principle of State continuity. In order to avoid a potential hiatus of institutionalised power every four years, they were inspired by examples 'which exist in abundance in comparative law',[16] according to which the term of office of the President differs from that of the members of Parliament.

The real impact of this change will be seen in practice in the parliamentary elections of 2008, when President Băsescu will be unable to directly 'blaze a trail' for 'his' party anymore. The most he can do is to prepare for the presidential campaign of 2009, should he decide to run for re-election.[17] However, the total absence of the President of Romania from the political arena at such an important moment as parliamentary elections is unthinkable. Given the relatively strong tensions, easy to perceive as they surface in the current Romanian political environment, it is reasonable to expect that the 'Player President' or that the 'Actor President'[18] will be present and active in 2008 and in 2009 as well, even if his role

subsequently joined the ranks of the 'Alliance for Justice and Truth' coalition (made up of PNL and PD) in order to be part of the Government. Following harsh verbal confrontations between the head of this party and the head of State, the PC went into opposition and played quite an important role in the suspension procedure launched against the President of Romania in March-April 2007.

[14] Because the leader of the PD, one of the two main parties in the 'Alliance for Justice and Truth', was elected President of Romania, in accordance with the political agreement signed before the elections, the head of the other political party (PNL) had to be appointed Prime Minister.

[15] M. Constantinescu, I. Muraru, A. Iorgovan, *Revizuirea Constituției – explicații și comentarii* [Constitutional Revision. Explanations and Comments] (Bucharest, Rosetti publishing house 2003) p. 72.

[16] Ibid., indirect reference to France.

[17] This is very likely to happen, if one takes into account his extremely notorious statements made after taking up residence at the Cotroceni Palace: 'I have come here to stay for ten years'.

[18] As Băsescu projected himself as head of State during the election campaign and defined himself as President in the countless politically difficult situations he had to deal with, either directly or indirectly, since the beginning of his term of office.

https://doi.org/10.1017/S1574019608000643 Published online by Cambridge University Press

cannot have an identical weight in both cases. This also seems to be the understanding of the Constitutional Court, as it stated that

> the constitutional prerogatives, as well as the democratic legitimacy of his direct election by the constituents, make it mandatory for the President of Romania to play an active role, since his presence in political life cannot be reduced to a simple, symbolic and artificial exercise.[19]

In this respect, it may be interesting to note that the charisma of President Băsescu, who has relinquished his membership of the Democrat Party (PD) and is under a constitutional obligation of political neutrality, has been abundantly used in the electoral campaign for the European Parliament by the Democratic Party, albeit in a subliminal manner.[20]

Political neutrality

However, if the current President were to get too involved in parliamentary elections he would likely be in violation of the obligation of political neutrality laid down in the Constitution. Indeed, Article 84 provides quite clearly that 'during his term of office, the Head of State shall not be a member of any political party.' But the Constitution formally forbids only membership of political party, not sympathising with it; such sympathies, even if publicly expressed, are not covered by the scope of this interdiction. According to the Constitutional Court,

> the Constitution does not forbid the President to maintain his relationships with the political party that provided him support throughout the elections or with any other political parties. Such a ban would not be in the spirit of the Constitution if the President is elected based on a direct, individual vote, owing to his political agenda and if he is accountable to his voters for the fulfilment of this programme. It is obvious that in order to put his programme into practice, the President may carry out a dialogue with the political party of which he used to be a member or with a completely different political party that could provide support in terms of the implementation of this programme.[21]

The political neutrality of the Head of State had already been challenged at the time of the adoption of the Constitution in 1991. During debates in the Constituent Assembly on the ban imposed on the President to hold any political party

[19] Advisory Opinion No. 1/2007, *OJ* No. 258, 18 April 2007.

[20] The PD posters carried pictures of all the candidates proposed by the party for the European Parliament, framing a large open space, placed in the middle, on which a caption read: 'busy elsewhere'.

[21] Advisory Opinion No. 1/2007, *OJ* No. 258, 18 April 2007.

https://doi.org/10.1017/S1574019608000643 Published online by Cambridge University Press

membership, some doubted the efficacy of such a provision.[22] Others noted that this interdiction would not be consistent with the constitutional provision that allowed the incumbent President to take part in the elections for his own succession.[23] Institutional practice has already shown that this constitutional provision stipulates rather a *desideratum,* which is difficult to implement.

On the one hand, the overwhelming majority of those who ran[24] for the Presidency since 1991 were members or even presidents of political parties. Even more significant is that all Presidents of Romania had been the presidents of the political parties that nominated them for the presidency.[25] Not only is it more efficient and less costly to have an election campaign conducted with the support of an entire political party infrastructure, it may also have a much more powerful impact on the voters and meet several goals.[26] These advantages come along with services to be returned, including the fact that the President adopts the election programme of the respective political party and, once elected, will try to put it into practice. Even if the President strictly observes the mandatory neutrality with respect to political parties, his actions will undoubtedly serve the same political programme of the party of which he was a member until the elections. In other words, even if the President is subjectively neutral, he will be objectively confined to a certain form of political bias.

[22] 'Would a President lose his political beliefs, which are the very reason for his being elected? I certainly do not think so. On the other hand, any elected President will be President, in general, until a replacement is found in the following elections. In such a situation, how could he take part in the subsequent elections on the list of a political party, how could he engage in an election campaign? His options would be either to disregard his duty or not to participate in the elections. Finally, in my opinion, this provision is purely artificial, since the elected President will maintain quite close relationships with the party that proposed and supported him in the elections, whether the Constitution allows it or not.' (P. Morar in *Geneza Constituției României 1991*, *supra* n. 3, at p. 504.)

[23] 'A political party membership means having a political option, the acceptance of an ideology, of a political agenda. If, after being elected, the President declares that he is not a member of the respective political party anymore, will his ideas or his ideological conception change? I really do not think so. But I will even go further. Let's assume for the sake of argument that the same person could take part in elections for a second time to become President again. Quite obviously, this intention will be submitted before the expiry of his term of office. After that, there is an election campaign. Will he join the ranks of a political party to have an election campaign take care of him? And whose programme and ideology will he exhibit throughout his following mandate? I think we are not making any sense whatsoever.' (G. Kozsokar in *Geneza Constituției României 1991*, *supra* n. 3, at p. 504-505).

[24] Law No. 370 of 2004 on the presidential elections, *OJ* No. 887, 29 Sept. 2004, provides the possibility of independent candidates, namely candidates not supported by political parties but by a minimum of 200,000 qualified voters only.

[25] These were the cases of Iliescu in 1992 and 2000, Constantinescu in 1996 and Băsescu in 2004.

[26] *See* above, on the part of 'trailblazer' played by candidates in presidential elections for the benefit of their political groups.

https://doi.org/10.1017/S1574019608000643 Published online by Cambridge University Press

On the other hand, this mandatory neutrality would make one believe that any successful candidate to Presidency must *ipso facto* undergo a type of 'political death' at the end of his term of office, if he wants to get re-elected.[27] According to the election law,[28] there is a possibility to have independent candidates, and they have participated in all elections since 1989. However, they have never been successful.

In this context, the provision included in the election law of 2004,[29] according to which the President at the end of his mandate can submit his candidature in parliamentary elections as an independent candidate on the list of a political party, created a lot of commotion, not only among the political elite, but also amongst the voters. They wondered whether such an 'independent' candidate would be just as independent as those supported by at least 200.000 qualified voters (namely by those who are not affiliated to any political party – *see* note 24 – and who rely only on the support offered by the 200.000 voters registered on their nomination petition).[30] Furthermore, such an 'independent' candidate, as incumbent President of Romania, could not be member of any political party, but would certainly depend on the willingness of the respective political party to include him in the list. Nevertheless, the Constitutional Court accepted the provision, stating that

> the possibility given to the President of Romania to submit his nomination as an independent candidate on the list of a political party for a term of office of deputy or senator does not provide grounds for the unconstitutionality of the legal provision under analysis. (…) The matter of the means whereby the President fulfils his role in the State depends on the extent to which the President meets his obli-

[27] Correct fulfilling of presidential duties presupposes political neutrality during the entire term of office, that is until the inauguration of the next President. Therefore, at the end of his term, the incumbent President theoretically has only two possibilities if he wants to continue political life: either to register with a political party, but that would be too late for the presidential campaign, or to be an independent candidate while still in office.

[28] Cf. Art. 5 of Law No. 373 of 2004 regarding the parliamentary elections, *OJ* No. 887 of 29 Sept. 2004; Art. 3 of Law No. 370 of 2004 regarding the presidential elections, mentioned above.

[29] Para. 7 of Art. 5 of Law No. 370 of 2004 regarding the presidential elections, mentioned above.

[30] With the change of Art. 5 in the law on presidential elections there are now two types of independent candidates for parliamentary elections (while there is still only one kind of independent candidates for the presidential elections), namely: 1. the (« regular ») independent candidates – mentioned by Art. 5 of the law on parliamentary elections – i.e., those who have to provide a list of supporters of 200.000 voters for their registering as nominated candidates (the same situation exists for the presidential elections) and 2. the (new category of) independent candidates – mentioned by Art. 5 of the law on presidential elections – i.e., those who may be included on the list of a political party although they are not members of that party. The independency of this last category of candidates was under discussion during the election campaign in 2004. In fact, this is how Mr. Iliescu is now member of Parliament although he re-joined PSD only after the elections.

https://doi.org/10.1017/S1574019608000643 Published online by Cambridge University Press

> gations and on his ethics during the exercise of the mandate, which, if completely disregarded, may make the mandate holder constitutionally accountable. Otherwise, *mutatis mutandis*, the situation will be similar if the President runs for a second successive term of office, according to the provision of Article 81, paragraph 4. One could not know how to ban a current President from running on the lists of a political party for a second successive term of office, since it would make the constitutional provisions referred to impossible to apply and void.

And the Constitutional Court continued:

> The President of Romania is not included in those limited categories of citizens who are denied the fundamental right to be elected, even if during his mandate he cannot be a member of a political party. According to the principle of the strict interpretation of exceptions, the Court cannot opine that the situation provided in Article 84 paragraph 1 of the Constitution, establishing a temporary political incompatibility for the President of Romania, could have as a consequence the prohibition of the right to be elected President of Romania so long as he does not become a member of a political party, since the appropriate constitutional provision is missing in this respect. The Court finds that only an extreme interpretation of the situation provided in the challenged text could convert this situation into the incompatibility provided in Article 84 paragraph 1 and in the denial of the right to be elected, as stated in the referral. Such an interpretation, which would be the creation of a constitutional provision in disguise, is contrary to the principle of constitutional precedence, to the constitutional and judicial status of this Court, forbidding it to play the part of a positive legislator.[31]

Professor Tudor Drăganu, a well-informed and well-reputed analyst of Romanian politics and also a refined connoisseur of comparative law, already stated in 1998 that Article 84 of the Constitution concerning the ban on the President to be a member of a political party 'was bound to be just paper'. Even if, after the elections, the President is not the formal leader of the political party with whose support he won, he will continue to be the invisible guide of this party, at least in terms of the most important political matters. Additionally, if he wants to have the support of his own party in the presidential or parliamentary elections to follow the expiry of his term of office, the President of Romania will inevitably be placed in a position of having to pose as a member of this party and to behave as its 'true army commander'.[32]

[31] Decision No. 339 of 2004, *OJ* No. 887, 29 Sept. 2004.

[32] T. Drăganu, *Drept constituțional şi instituții politice. Tratat elementar* (Constitutional law and political institutions. Elementary treatise) Vol. II (Bucharest, Lumina LEX publishing house 1998) p. 234.

https://doi.org/10.1017/S1574019608000643 Published online by Cambridge University Press

It did not take long to have this analysis confirmed. All of those who have held presidential office have kept quite significant informal connections with their party and followed policy that was perfectly aligned to the political programme of that party. In this context it is noteworthy that this mandatory political neutrality is applicable only to the elected President. During the month in which the President of Romania was suspended owing to the impeachment procedure initiated by Parliament in the spring of 2007, the acting President, who was the President of the Senate and also a member of the main opposition party, never resigned from his party.

Presidential role and tasks

A simple reading of the text of the Constitution of Romania of 1991 is enough to conclude that its drafters took the French Constitution of 1958, as amended in 1962, as their model. In the words of a member of the technical committee for the drafting of this text:

> The President personifies the Romanian State and is the symbol of the entire nation, which is why he must be directly elected by the people. In exercising his tasks, he shall ensure the equilibrium and a smooth operation of the public authorities, in line with the principle of the separation of powers.[33]

The same logic and goals had inspired the amendment of the French Constitution in 1962. In a press conference on 31 January 1964, General de Gaulle described his own perspective regarding the mission of the French Head of State:

> obviously, one must understand that the President receives the entire, indivisible, state authority from the people that elected him, and that there is no ministerial, civil, military or judicial authority that is not conferred on or maintained by the President.[34]

Such a vision of the role and mission of the Head of State is not completely alien to the Romanian institutional heritage, according to which one single individual must be capable of imposing his will on all the other public institutions and authorities. However, there is nothing to prevent such a Head of State from functioning in a democratic environment.

[33] F. Vasilescu in *Geneza Constituției României 1991*, *supra* n. 3, at p. 489.
[34] Cf. Th.S. Renoux, M. de Villiers, *Code constitutionnel* (Paris, Litec 1994) p. 242.

https://doi.org/10.1017/S1574019608000643 Published online by Cambridge University Press

Article 80[35] of the Romanian Constitution is directly inspired by Article 5[36] of the French Constitution of 1958. Just as in France, the Head of State is configured with an intentional sense of indeterminacy, which makes it difficult to make a connection between the notions of *mediator* and *guarantor* and a unique State authority entrusted with a unique mission. Just as in the French case, the meaning of the constitutional text cannot be deduced entirely by means of a simple exegesis, but follows more from the use each President makes of the powers with which he had been entrusted. But whereas the French Head of State was provided with important means of action in the Constitution, and in practice always has been quite powerful and succeeded in penetrating the entire constitutional architecture with his authority, the Romanian Head of State is considerably weaker in view of the instruments available to him. The revision of 2003 did not significantly change this and was not successful in finding an equilibrium between the role entrusted to the Head of State according to Article 80 of the Constitution and his powers according to the same fundamental law.

Thus, according to the Constitution, the President represents the State. He shall safeguard the national independence, the unity and the territorial integrity of the country. He shall oversee the observance of the Constitution and the smooth operation of the public authorities. To this end he shall act as a mediator among State powers and between State and society. Such a role presupposes a type of authority 'placed in a top position within the architecture of the entire State',[37] a type of authority that could completely assume the management of a society, as well as of all the other state authorities. But the constitutional articles providing the specific powers of the Romanian Head of State are at odds with this expectation. However, his (relative) weakness is not only the consequence of the lack of balance between his role on the one hand and his powers on the other, but also of the ambiguity of the political system encapsulated by the Constitution. Although the Constitution seems to initiate a semi-presidential system, the powers con-

[35] According to which: 'The President of Romania shall represent the Romanian State and shall safeguard the national independence, the unity and the territorial integrity of the country. The President of Romania shall oversee the observance of the Constitution and the proper operation of the public authorities. To this purpose, the President shall act as a mediator between the powers, as well as between the State and society.'

[36] 'The President of the Republic shall oversee the observance of the Constitution. He shall ensure, by his arbitration, the proper functioning of the public authorities and the continuity of the State. He shall safeguard the national independence, the integrity of the territory and the observance of the treaties.'

[37] G. Vrabie, 'Le régime politique de la Roumanie', in G. Vrabie (coord.), *Les régimes politiques des pays de l'Union Européenne et de la Roumanie* (Bucharest, the Regia Autonomă Monitorul Oficial publishing house 2002) p. 397.

https://doi.org/10.1017/S1574019608000643 Published online by Cambridge University Press

ferred upon the Romanian President deprive him of efficient tools to deal with other State authorities, particularly with Parliament and Government.

Representation of the State

In order to fulfil his duty of representation, the President has certain powers on the national[38] and international[39] levels. However, although the President is supposed to personify the power of the state, the powers attributed to him are rather limited, which makes him 'a colossus with clay feet'. Without being entirely decorative, the representation role of the President of Romania has quite a strict and tight institutional framework: according to the Constitution, the powers which could allow the President to provide momentum to political life are either shared[40] with other institutions or devoid of legal effect.

Powers shared with other public authorities:

Guarantor of national independence, unity and territorial integrity

In his capacity of guarantor of independence, the President of Romania possesses quite important means of action, but he is constantly subject to parliamentary oversight. Thus, according to Article 92 of the Constitution, he is the Commander-in-Chief of the army. In this capacity, he may order partial or total mobilisation, but only with prior approval by Parliament. Even in cases of military conflicts the President must keep Parliament informed at all times of the operational steps taken and, if Parliament is in recess, must call a Parliament session immediately. According to Article 93 of the Constitution, the President may proclaim the state of emergency or the state of siege, but he must obtain Parliament's approval within the following five days. In addition, this function of safeguarding the national independence and the territorial integrity is actually fulfilled rather by the military than by a Head of State who is its commander only symbolically.[41] In reality, the President thus only has a limited decisional power, which is shared with Parliament.

[38] Cf. Art. 94 of the Constitution, the President confers titles of honour and decorations, promotions to the higher military ranks, and has the right to appoint high State officials and to grant pardon.

[39] Cf. Art. 91 of the Constitution, the President signs the international treaties negotiated by the Government, accredits and recalls diplomatic envoys of Romania, receives the credential letters of the foreign ambassadors in Romania, and represents the State in its international relations.

[40] For an analysis of the own and shared powers of the head of State in a semi-presidential regime, *see* M. Duverger, *Les régimes semi-présidentiels* (Paris, P.U.F. 1986) *passim.*

[41] T. Drăganu, *supra* n. 32, p. 226.

https://doi.org/10.1017/S1574019608000643 Published online by Cambridge University Press

Guardian of Constitution

The President must oversee the observance of the Constitution by all state authorities and by its citizens. In fact, this role is kept on a quite abstract level, since the Constitution does not specify which are the instruments available to the President to carry out his task. If before the constitutional revision of 2003, the observance of the supremacy of the Constitution, as well as of all the other laws, was a fundamental duty of the Romanian citizens, the revision reworded the same legal content so as to make it into a fundamental principle of the State.[42] The fundamental principle of the rule of law compels all public authorities to observe the Constitution.[43] One could easily infer that the role of the Romanian President as 'guardian of the Constitution' would be a simple echo of Carl Schmitt's theory and that the observance of the Constitution is actually safeguarded by other means.

However, the syntagm used in the text of the fundamental law ('observance of the Constitution') refers to a field of activity particular to the executive power, namely, the enforcement of the Constitution. Enforcing the Constitution is a task of the President; however, guaranteeing its supremacy, including settling disputes on the basis of the Constitution, belongs to the competence of a different State authority, namely the Constitutional Court.[44] The Constitution is quite formal in this respect: the powers of the Head of State and those of the constitutional judge shall complement each other without being in conflict. Quite on the contrary, there are certain activities where their actions must be concerted. Thus, the Head of State has the possibility of referring a law to the Constitutional Court before its entry into force,[45] even if he has already asked the Parliament to take a second look at it.[46] It must be noted that the possibility of requesting that Parlia-

[42] The fifth para. added to Article 1 of the Constitution provides moreover that: 'The observance of the Constitution, its supremacy and of the laws shall be mandatory in Romania.'

[43] Art. 1(3) of the Constitution contains since the constitutional revision of 2003 only the second part of the phrase: 'Romania is a democratic and social state governed by the rule of law, in which human dignity, the citizens' rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values, in the spirit of the democratic traditions of the Romanian people and the ideals of the Revolution of December 1989, and shall be guaranteed.'

[44] Art. 144(1) of the Constitution provides that: 'The Constitutional Court shall safeguard the supremacy of the Constitution'.

[45] According to Art. 146 of the Constitution, the constitutionality check of laws may be exercised before their promulgation 'upon referral by the President of Romania, by the Speaker of one of the two Houses of Parliament, by the Government, by the High Court of Justice and Review, by the Romanian Ombudsman, by 25 senators or by 50 deputies.'

[46] According to Art. 77(2) of the Constitution, 'before the promulgation, the President may ask the Parliament only once to review the law.'

https://doi.org/10.1017/S1574019608000643 Published online by Cambridge University Press

ment review a law adopted by it, is one of the President's rare completely discretionary powers. The President may ask Parliament to review a law on grounds of opportunity and lawfulness. But this is far from signifying that the decisional (legislative) power is shared between the Head of State and Parliament. The legislature has the final say and may keep to its initial decision. If the issue emphasised by the President is constitutional in nature, he might subsequently refer the matter to the Constitutional Court.

After 2004,[47] the Head of State began systematically to oppose laws issued by Parliament as a means to put pressure on a Parliament that, at times, seemed to stray too far from its electoral basis[48] or that ignored matters of extrinsic constitutionality.[49] Whenever the President was discontented with the outcome of the legal review conducted by MPs, he took the matter to the Constitutional Court and usually won his case.[50] Moreover, this allowed the incumbent President to emphasise his role of guardian of the Constitution with regard to all public authorities, including Parliament. Equally, this technique enables him, at times, to interfere with the guardianship role in terms of Constitutional supremacy, entrusted not to the President, but to the Constitutional Court.[51] All this merely

[47] The President returned 25 bills to Parliament for review, in the current legislature, namely 12 to the House of Deputies, and 13 to the Senate. (Cf. http://www.cdep.ro/pls/proiecte/upl_pck.lista?cam=2&std=R and http://www.cdep.ro/pls/proiecte/upl_pck.lista?cam=1&std=R, last checked on 5 Nov. 2007).

[48] In a law concerning the legal status of deputies and senators, the MPs granted themselves pecuniary privileges out of proportion in the field of social welfare and retirement benefits, while all expenditures had to be sustained from the public budget, that is by the entire Romanian taxpaying population. Because of the powerful response given by society at large and the intensive media campaign following step by step the legislative process of this particular law, the head of State required that it would be reviewed by Parliament. However, the review did not change the provisions considered as most arbitrary and inequitable. As he received the law a second time for promulgation, the President referred it to the Constitutional Court. In its ruling, the Constitutional Court concluded that the law was constitutional in part, and thus the majority of the pecuniary privileges of MPs were validated. (Decision No. 279 of 2006, *OJ* No. 323, 11 April 2006.)

[49] The legislative procedure in Romania makes a distinction between ordinary laws, adopted with the simple majority of deputies and, respectively, senators, and organic laws, adopted with an absolute majority of members of each House of the Parliament. Moreover, the legislative process must begin in the House declared by Art. 75 of the Constitution to be 'the first notified' and must end in front of the 'decisional House'. In practice however, there are numerous cases of organic laws adopted with the majority required for ordinary laws, while the House to be 'first notified' is often mistaken for the 'decisional' one.

[50] *See also* the ruling (of complete unconstitutionality) No. 418 of 2005 on the Law concerning the reproductive health and the clinically assisted human reproduction, *OJ* No. 664, 26 July 2005.

[51] In the open confrontation between the parliamentary majority and the opposition on a legislative package concerning the reform of the judiciary, the Constitutional Court found itself in the middle of a political debate, where the President of Romania would be making the rules. After a first ruling of partial unconstitutionality, when it invalidated a modest chunk of the legislative package,

https://doi.org/10.1017/S1574019608000643 Published online by Cambridge University Press

confirms the presumption of shared power (in this case between the president and the Constitutional Court), the exercise of which *in concreto* depends on the institutional relationships established between the players concerned.

Powers devoid of legal effect

Mediator among State powers and mediator between State and society

It would be difficult, in theory, to conceive of harmony between the task of *mediator* and that of *guarantor* fulfilled by the same State institution, but according to the Romanian Constitution, each one operates in a different field. In addition, the mediation function does not have a clearly defined content, since there are several presidential powers to give it more concrete shape, such as the calling of a people's referendum with an advisory function (Article 90), the optional consultation of the Government (Article 86), the participation in the governmental meetings (Article 87), the delivery of messages in Parliament (Article 88), the referral of laws to the Constitutional Court before their promulgation (Article 146), etc. Questions were raised with regard to the legal nature of an institution that has the duty of ensuring the balance among other State authorities on the one hand and between the State and society at large on the other,[52] in view of the mandatory neutrality required for this function. Authors generally consider that the mediation function should not be viewed in the light of its legal connotation of neutrality,[53] but is primarily of political significance.[54] In line with this subtle difference between legal and political aspects of mediation, the Constitutional Court considered that

> the mediation function of the Head of State, according to Article 80 paragraph 2 of the Constitution, imposes on the President the duty to be impartial, but it does

the Court saw its legitimacy contested and doubt was cast over the binding nature of its decisions. In those difficult moments, the President convened an *ad hoc* consultation with the speakers of the two Houses of Parliament and the President of the Constitutional Court to find a solution to this deadlock. And it was only after this 'mediation' that the legislative package could be sent back again to the Parliament for review. The revised version of the legislative package has been referred again to the Constitutional Court by the President. The Court issued a ruling in favour of the constitutionality, to which it appended its interpretation. (Decision No. 375 of 2005, *OJ* No. 591, 8 July 2005, and Decision No. 419 of 2005, *OJ* No. 653, 22 July 2005).

[52] F. Vasilescu, *Constituția României – comentată şi adnotată* [The Romanian Constitution – Comments and Notes] (Bucharest, the Regia Autonomă Monitorul Oficial publishing house 1992) p. 182.

[53] D. Apostol-Tofan, *Drept administrativ* [Administrative Law], Vol. I, (Bucharest, ALL Beck publishing house 2003) p. 103.

[54] A. Iorgovan, *Tratat de drept administrativ* [Treatise of Administrative Law], Vol. I (Bucharest, ALL Beck publishing house 2005) p. 292.

https://doi.org/10.1017/S1574019608000643 Published online by Cambridge University Press

> not preclude him from expressing his opinion on the optimal manner of solving matters when there is a disagreement. The President has the same right as the Members of Parliament to express his political opinion. This right is safeguarded by the legal system of the immunity of the Head of State, which has the same extent as the immunity of Members of Parliament, according to Article 84 paragraph 2 of the Constitution.[55]

The Court went further and stated that

> opinions, observations, preferences or instructions of the President have no decisional nature and cannot therefore produce any legal effects, since it is up to public authorities to either implement or disregard them.[56]

In other words, the constitutional role of the President of Romania is that of a mediator, but as such is devoid of any constraining effect.

Advisory referendum

Article 90[57] of the Constitution makes it possible for the President to call for a referendum that has 'all the features of a plebiscite'.[58] In spite of appearances, there are several marked differences with respect to the similar prerogative of the President of the French Republic.

First, contrary to his French counterpart, to consult the people the Romanian President must first consult Parliament. True, the opinion of Parliament regarding the timeliness of a referendum or the manner in which the question must be worded does not bind the President in any way. The general law on the organisation of referendum[59] tends to be quite specific on this point when it comes to this kind of referendum. In practice, however, the need to co-ordinate with Parliament leaves him very little discretionary power.

Secondly, one must emphasise a very significant detail: the consultation of the people by the Romanian President cannot end with the adoption of a legal instrument. A referendum in fact aims at conducting a popularity check on the President. Although the Constitution does not clearly qualify this referendum as advisory, the Constitutional Court was not hesitant in stating that

[55] Decision No. 53 of 2005, *OJ* No. 144, 17 Feb. 2005.

[56] Advisory Opinion No. 1 of 2007, *OJ* No. 258, 18 April 2007.

[57] Art. 90: 'The President of Romania, after consulting with the Parliament, may ask the people to express their will in a referendum regarding matters of national interest.'

[58] I. Muraru, E.S. Tănăsescu, *Drept constituțional și instituții politice* [Constitutional Law and Political Institutions], Vol. II (Bucharest, ALL Beck publishing house 2006) p. 140.

[59] Law No. 3/2000 on the organisation of referendum, published in the *OJ* No. 84/2000, with all posterior changes and revisions.

https://doi.org/10.1017/S1574019608000643 Published online by Cambridge University Press

> the constitutional right of the President to call for a referendum cannot confer on him the power to legislate, since, according to the will of the Romanian constitutional assembly, the President cannot initiate a legislative, but only a consultative referendum.[60]

There is nothing to prevent Parliament, or any other public authorities for that matter, from taking the outcome of a referendum initiated by the Head of State into account, but there is also nothing, on the other hand, to compel them to do so. The Romanian referendum is plebiscitary by nature and it would be good if it were used only rarely. In practice, the only President who had recourse to it[61] is the current one, and this happened only subsequent to his subjection to an accountability procedure in front of Parliament, a procedure which ended with another referendum.[62]

The only features that are discretionary for the President are the setting of the date of the referendum and the definition of the 'matter of national concern'.

The current President has waged a furious war to preserve the feeble discretion provided for him in the constitutional text. In a series of decisions,[63] the Constitutional Court has been successful in preventing various attempts by MPs to reduce the discretionary margin of the Romanian Head of State in terms of the advisory referendum. Thus, the Court ruled that

> the referendum may be called for at any moment during the year, on condition that Parliament had been previously consulted on the matter or that it had endorsed the suspension of office of the President of Romania. According to the Constitution, there is no other condition that would ban the organisation and development of a referendum simultaneously with the presidential, parliamentary or local elections or elections to the European Parliament, or during a certain period before or after the elections mentioned above. Consequently, *ubi lex non distinguit, nec nos distinguere debemus*'.[64]

[60] Decision No. 70 of 1999, *OJ* No. 221,19 May 1999.

[61] A referendum based on a presidential initiative, regarding the change of the Romanian electoral system from proportional representation to election by simple majority, was held on the same day as the elections for the European Parliament (25 Nov. 2007). This was in spite of the fact that Government had already been responsible for a bill concerning the same topic and, basically, containing the same solution. The essentially plebiscitary nature of this presidential referendum is emphasised by the fact that the differences between the electoral system suggested by the head of State and the one already accepted by the Parliament are minimal.

[62] During 2007 the Romanian population was called upon in two different kinds of referendum: a mandatory one in May, as the last phase of an impeachment procedure according to Art. 95(3) of the Constitution, and a consultative one in Nov., at the initiative of the President, according to Art. 90.

[63] Decision No. 567 of 2006, *OJ* No. 554, 27 June 2006, Decision No. 147 of 2007, *OJ* No. 162, 7 March 2007, Decision No. 355/2007, *OJ* No. 318, 11 May 2007, and Decision No. 392 of 2007, *OJ* No. 325, 15 May 2007.

[64] Decision No. 355 of 2007, mentioned above.

https://doi.org/10.1017/S1574019608000643 Published online by Cambridge University Press

The Court also said that

> the definition of matters of national concern is the attribute of the President of Romania, whereas Parliament must be consulted with respect to the call for a referendum on these matters of national concern.[65]

Ambivalent relationships with Parliament and Government

The powers of the Romanian Head of State are, in general, specific to the executive branch, but presuppose a sharing of powers with the Government, under Parliament's oversight. The division made by the Constitution in terms of decisional powers and blocking powers[66] entrusted to the President clearly favours the latter. Moreover, the very few co-decisional powers of the Romanian President that do not require endorsement by the Prime Minister[67] concern either his relationship with Parliament[68] or his appointment of public officials, which is anyway conditioned by the initiative of other public authorities.[69] This confined legal framework could explain the reality of the recent years, when, subsequent to the entry into force of the Constitution of 1991, six out of eight governments maintained tense contacts with the President. According to one of the most informed researchers of Romanian constitutional life,

> The Constitution established two strong, clearly defined State authorities, Parliament and President, but with very little room for each of them to efficiently influence the other. At the same time, the executive branch is bicephalous, which compels the President to cooperate with the Prime Minister in conditions and according to procedures that are not always very clear.'[70]

[65] Decisions No. 567 of 2006 and No. 355 of 2007, mentioned above.

[66] The decisional powers take the concrete shape of decisions of the head of State for which he bears sole responsibility, even if this exercise may be subject to certain conditions, such as the necessary co-operation with other state authorities. The powers to block or to co-decide are necessarily shared and become even more important especially if the acts of the head of State must not be counter-signed. (Cf. M.Duverger, *Les régimes semi-présidentiels* (Paris, P.U.F. 1986), *passim*.

[67] According to Art. 100(2) of the Constitution, the Prime Minister must endorse the presidential decrees referring to the ratification of international treaties, the accreditation of foreign diplomats in Romania, the army mobilisation ordered in the absence of a preliminary authorisation by the Parliament, the instituting of exceptional measures, as well as the pardon decrees, and the civil and military decoration decrees.

[68] E.g., the request to review a law, the presidential messages or the dissolution of Parliament.

[69] Thus, according to Art. 125 of the Constitution, the appointment of judges by the President is conditioned by the proposal from the Higher Council of Magistrates. In practice, this task has always been considered a circumscribed power of the head of State.

[70] T.Drăganu, *Drept constituţional şi instituţii politice. Tratat elementar*, Vol. II (Bucharest, Lumina LEX publishing house 1998) p. 229-230.

https://doi.org/10.1017/S1574019608000643 Published online by Cambridge University Press

Difficult relationships with Parliament

The Constitution provides for difficult or unproductive institutional relationships between the President and Parliament. The latter is supposed to co-operate with the Head of State in a number of fields, but it may not influence the former in the performance of his duties. Parliament may, however, suspend the President. In exchange, the President is deprived of any means to induce Parliament to adhere to his political conception, even if, in theory, he could decide to dissolve Parliament.[71]

Limited collaboration in legal matters

The Head of State cannot introduce a bill, except a bill to amend the Constitution; even in this case, he only has a shared power. According to Article 150 of the Constitution, the initiative to amend the Constitution belongs to the President upon a proposal of the Government. His right to promulgate laws does not signify that the President takes part in the legislative process, but only confers on him the power to certify the regularity of this process and compels state authorities to begin the enforcement of the law.[72] In addition, the possibility of asking Parliament, just once, to review a law adopted but not yet promulgated does not constitute a true *veto*, since Parliament may take the same decision twice, ignoring the contrary opinion of the President.[73]

Presidential messages

Just as he can communicate with the people or with Government, the President can also communicate with Parliament, by delivering messages. These messages are political acts,[74] fulfilling a double function: making two directly legitimated State authorities communicate, and allowing the President to take initiatives with respect to important national issues that require action by other public authorities, especially Parliament. However, these messages are not binding in any way upon the legislative power. Parliament must organise a joint session for the deliv-

[71] The Romanian President may also convene the Parliament, but only for the first plenary sitting following the elections; this is a circumscribed power of the head of State, as Art. 63 of the Constitution obliges him to do so within 20 days of the date of the elections.

[72] I. Muraru, E.S. Tănăsescu, *Drept constituțional şi instituții politice*, Vol. II (Bucharest, ALL Beck publishing house 2006) p. 242.

[73] *See* above, including the power of the head of State to make a referral to the Constitutional Court if there is a question of unconstitutionality.

[74] The Court had already decided in 1994 that the presidential message was a subjective right of the head of State, corresponding to the obligation of Parliament to receive it. This right has to be exercised by means of a purely political and unilateral act of the President, which does not presuppose the counter-signing by a Minister. (Decision No. 87/1994, *OJ* No. 292, 14 Oct. 1994.)

https://doi.org/10.1017/S1574019608000643 Published online by Cambridge University Press

ery of the presidential message, but according to the Constitutional Court, is not bound to respond to, or even to hold a debate on the content of the message:

> [T]here is no constitutional provision that would state the obligation to submit such a message to parliamentary debates. Given his role and direct legitimacy, equal to that of the Parliament, the President cannot take part in the parliamentary debates, as he would thus engage his political responsibility. The message received by the Houses of Parliament in their plenary session is but one of the faces of the cooperation between two directly elected authorities, which should raise the awareness of the MPs of the opinions of the President regarding the main political issues for the nation. That is precisely why, after receiving the message, certain aspects of this message could be subject to parliamentary debates, but only as separate topics on the agenda. Nothing can bind the Parliament to debate an issue included in the message that it received and to adopt a measure based on this debate. But the deliberation whether or not to do so takes place subsequent to and following the receipt of the message, without the President being present. The subject and aim of such a debate cannot be the rejection of the message, since *to receive* cannot be mistaken for *to reject*. The debate could only focus on the parliamentary reactions with regard to the topic raised, and, as the case may be, on the adoption of the corresponding measures.[75]

If the President were to participate in, or would be present at, a parliamentary debate on a presidential message, that would contravene the principle of separation of powers.[76] Obviously, there is nothing to preclude Parliament from attempting to solve the issues highlighted by the President, but this has never yet happened in practice.

Dissolution of Parliament

Article 89 of the Constitution gives to the President the power to dissolve Parliament, which is however a purely nominal power as it can only be exercised under conditions that are almost impossible to meet in practice. The dissolution of Parliament may only take place subsequent to the consultation by the President of Romania with the speakers of the two Houses and the leaders of parliamentary groups, if no vote of confidence has been obtained to form a Government within 60 days after the first request was made and only if there have already been two other failures to get a vote of confidence for a new Government. In addition, Parliament may only be dissolved once during the same year and dissolution is

[75] Decision No. 87 of 1994, *OJ* No. 292, 14 Oct. 1994.)

[76] 'The organisation of parliamentary debates regarding the message of the President *in his presence* goes against the Constitution.' (Decision No. 87 of 1994, *OJ* No. 292, 14 Oct. 1994.)

https://doi.org/10.1017/S1574019608000643 Published online by Cambridge University Press

not allowed during the last six months of the presidential term of office, or during a state of siege or emergency, army mobilisation or a state of war.

The provision makes dissolution of Parliament impossible as a means to penalise Parliament since it merely attempts to avoid the prolongation of a situation of political and governmental instability beyond a period that the Constitution has deemed reasonable. The prevailing fear of the members of the Constitutional Assembly of too powerful a President resulted in parliamentary stability, strengthened by a strict interpretation of the theory of separation of powers. Since both have equal legitimacy, Parliament and the Head of State occupy relatively autonomous positions, which are only balanced by illusory or utopian mechanisms.

When President Băsescu wanted to apply Article 89 in the summer of 2005, he had to cope with an unexpected problem: the Prime Minister, his former ally in the election campaign, refused to give up the position of head of Government. Since the best opportunity to call for early elections had been lost once the Cabinet had obtained a confidence vote in Parliament and since the President had fully performed his 'trailblazer' part and had succeeded in imposing his own candidate, he had to put on the politician's hat, realising that he would only be able to dissolve Parliament if he first provoked the fall of the Government.[77] At that time, the Prime Minister had managed to get a legislative package adopted concerning the reform of the judiciary and restitution of properties nationalised during the communist regime,[78] though with some changes imposed by Parliamentary negotiations.[79] Consequently, the Government was enabled to continue its activity and the Prime Minister declared that the controversies raised concerning that legislative package between Government and Parliament, on the one hand, and the Constitutional Court on the other, were not likely to induce him to hand in his resignation. Thus, all attempts to dissolve Parliament had to be cast aside since the constitutional means to do so were lacking.

Political accountability

The drafters of the Romanian Constitution provided for two distinct types of accountability for the Head of State: a political one (*impeachment)*, with a procedure that entails, among others, a last stage when the President must re-appear in front of the voters, subsequent to the decision of Parliament to suspend him from

[77] Since the amendment of the Constitution in 2003, Art. 107(2) 2 of the Constitution specifically bans the President to dismiss the Prime Minister.

[78] *See supra*, n. 49.

[79] According to Art. 114 of the Constitution the Government may assume responsibility before Parliament concerning a bill. If a motion of censure is not passed putting the Government out of office, the bill is considered adopted with the changes negotiated with Parliament. This procedure was applied in this case.

https://doi.org/10.1017/S1574019608000643 Published online by Cambridge University Press

office,[80] and a legal (criminal) type of accountability, based on a judicial procedure where the role of Parliament is only to indict the Head of State.[81] This dual and unclear legal system had already been under scrutiny in 1991.[82] Debates in the Constitutional Assembly mentioned the possibility of the President having the power to dissolve Parliament after having been suspended and reconfirmed in a referendum, but the text was not altered and it continued to maintain its institutional ambiguity.

To this a second ambiguity can be added, since the Constitution does not define the 'grave acts infringing upon Constitutional provisions' that may be the reason for suspension. Twice consulted on the possibility of suspending the President, the Constitutional Court gave a circular definition: an act that disregards the Constitution, irrespective of whether it is an action or negligence, is severe in relation to the legal instrument that it disregards. However, not all acts committed by the current President in disregard of the Constitution can justify his suspension. The severe acts, 'as defined by the science of the law', are appraised in relation to the value that they go against, the consequences they entail, the means used, the person that commits them and in relation to the subjective position of the author, or even better, the goal sought by the latter. Applying these criteria deriving from Article 95 of the Constitution, the Constitutional Court ruled that the severe acts may be decisions by the President of Romania not to fulfil his tasks, or, moreover, to preclude other authorities from fulfilling their tasks, as well as decisions that restrict the rights and the liberties of the citizens, disturb the consti-

[80] Art. 95 of the Constitution provides that: '(1) In case of having committed grave acts infringing upon constitutional provisions, the President of Romania may be suspended from office by the Chamber of Deputies and the Senate, in joint sitting, by a majority vote of deputies and senators, and after consultation with the Constitutional Court. The President may explain before Parliament with regard to imputations brought against him. (2) The proposal of suspension from office may be initiated by at least one third of the number of Deputies and Senators, and the President shall be immediately notified thereof. (3) If the proposal of suspension from office has been approved, a referendum shall be held within 30 days, in order to remove the President from office.'

[81] Art. 96 of the Constitution regarding the charges that may be brought against the President provides that: 'The Chamber of Deputies and the Senate, in their joint session, may decide to charge the President of Romania with high treason, based on the votes cast by at least two thirds of the deputies and senators. The proposition regarding the charges may be initiated by the majority of the deputies and senators and must be immediately notified to the President of Romania, so that he may respond to the charges brought against him; from the date of the submission of charges until the date of his dismissal, the President shall be under *de jure* suspension. The jurisdiction shall belong to the High Court of Justice and Review in this case. The President shall be *de jure* dismissed on the date when the ruling to convict him shall become final.'

[82] 'If Parliament gives the President a vote of lack of confidence and, automatically, in line with the text of the Constitution, we have a referendum, and if in the referendum the President gets 60% of the votes, how can the President continue to stay with a Parliament that reprimanded him?' (D. Lăzărescu in *Geneza Constituției României 1991*, *supra* n. 3, at p. 496).

https://doi.org/10.1017/S1574019608000643 Published online by Cambridge University Press

tutional order or bear equivalent effects.[83] Anyway, 'the active role that the President decides to fulfil in the political and social life of the country cannot be characterised as behaviour contrary to the Constitution.'[84]

The fact that this constitutional provision has been applied twice in 16 years attests to the ambiguity of the relationship, laid down in the fundamental law, between Parliament and President. And if in 1994 Parliament accepted the negative advisory opinion given by the Constitutional Court concerning the commission by the incumbent President (at that time Mr. Iliescu) of 'severe acts in disregard of the Constitution', in 2007 the situation was completely different.

Often accused of populism, as he is so popular, during the first half of his term of office President Băsescu succeeded not only in isolating himself from the majority of the political class, but also from his former allies. The formal break-up of the 'Alliance for Justice and Truth' took place only in early 2007,[85] whereas its roots go back to mid-2005, when Prime Minister Călin Popescu Tăriceanu refused to supply a pretext to call for early elections, which allegedly could have yielded a higher parliamentary support for the President.[86]

In this context, on 12 February 2007, 182 MPs of the opposition (149 from the PSD and 33 of the PRM) signed a motion to ask for the suspension of President Băsescu from office. This motion was submitted to the Permanent Committees of the Houses of Parliament. The Conservative Party (PC) was also in support of this motion. The twenty-five grievances stated as grounds to initiate this procedure fall under four categories:

(i) A series of 'grave acts' (such as his attempt to undermine the real political thrust of the legislative elections of 2004, the systemic deadlock he imposed on Parliament in his attempt to replace the Speakers of the Chamber of

[83] Considered identical in the Advisory Opinion No. 1 of 1994 and in the Advisory Opinion No. 1 of 2007, mentioned above.

[84] Advisory Opinion No. 1 of 2007, mentioned above.

[85] In early April 2007, the Prime Minister decided to reshuffle his cabinet, by removing the ministers belonging to the party of the President (PD). A minority government, made up of the PNL and UDMR gained the confidence of Parliament because of the support of the PSD and of the parliamentary group of the national minorities. This was the dénouement of another political crisis, namely, the refusal by President Băsescu to sign the decree accepting the 'resignation' of the Foreign Office Minister (a member of the PNL), which precluded the formal appointment of a successor, who had however been designated by the Prime Minister. Thus the Prime Minister was compelled to cumulate his own function with that of the Foreign Office Minister for two months (*See also* below, the reshuffle of Government).

[86] Quite rapidly after the general elections of 2004, President Băsescu understood that he enjoyed much higher popular than parliament support and he began seeking means to change this situation. Thus, in July 2005 he publicly suggested that the Prime Minister submit his resignation in order to cause early elections, which the latter refused. (*See* above, the unlikely dissolution of Parliament)

https://doi.org/10.1017/S1574019608000643 Published online by Cambridge University Press

Deputies and Senate, and his attempt to force the resignation of the Prime Minister in 2005) violating the Constitution, because the President wanted to become the main player of political life, in spite of constitutional provisions forcing him to co-operate with all public authorities.

(ii) A series of another type of grave acts which demonstrate that the President had attempted to use the State institutions for his own gain (such as interference in the activity of the Ministry of Justice or the creation of a new national intelligence agency directly subordinated to him).

(iii) Allegations regarding attempts of the current President to protect certain mafia interests in the profitable sectors of the economy (based on media campaigns with a huge impact on the population).

(iv) And, finally, the general accusation that he used political crises as a major tool of governance, as it is the only way whereby President Bãsescu could assume the role of 'saviour' of the country.

In parallel with the review of these grievances by the Constitutional Court, Parliament decided to set up an investigation committee,[87] made up of 15 members (composed according to the same ratio as parliamentary groups, but without any representative from the PD, the 'presidential' party). In its report, the committee found that President Băsescu had violated the Constitution. Informed of this decision, the President initially denied all charges,[88] and then declared in public that if Parliament voted for his suspension, he would hand in his resignation 'five minutes afterwards' to cause an early presidential election in which he would take part again as a candidate. He then remembered the constitutional provision banning the cumulation of more than two presidential mandates. As he was sure of his popularity, the following day he came back on his first declaration and promised to accept the outcome of the referendum organised in the framework of the suspension procedure. The media speculated that these contradictory public statements must have cost him some hundred thousand votes.

In its legal opinion, the Constitutional Court considered that, if the suspension was based on acts violating the Constitution committed by the President during his mandate, then, given their content and consequences, they could not be qualified as 'grave', but the final decision had to be taken by Parliament, since the procedure entailed political responsibility.

Without taking into account the advisory opinion of the Constitutional Court, and following the report of the investigation committee literally, Parliament sus-

[87] The setting up of this Parliamentary Committee according to a procedure that was not provided for in the Constitution was challenged in the Constitutional Court, which found it compatible with the fundamental law. (Decision No. 266 of 2007, *OJ* No. 322, 14 May 2007.)

[88] The President answered the Parliament in writing; he emphasised that all actions and statements he had taken or made since his election 'were in accordance with the constitutional order', and that his presence in Parliament during the debates concerning suspension 'was not necessary'.

https://doi.org/10.1017/S1574019608000643 Published online by Cambridge University Press

pended President Băsescu from office on 19 April 2007 with 322 votes in favour, 108 votes against and 10 abstentions (20 MPs were absent).[89]

In the referendum[90] organised on 19 May 2007, the population voted in favour of President Traian Băsescu with a majority of 6,059,315 out of the 8,135,272 the votes cast, comprising 74,48% of the total number of qualified participants. The turnout was 44.45%. On 24 May 2007 the reconfirmed President resumed his official duties.

Little or no clarity in relationships with Government

In contrast to the relationship he has with Parliament, the President of Romania has at his disposal certain institutional means with respect to the Government, which enable him to influence to a small extent, not the Cabinet's activity, but rather its way of operating.

Influence of President on Government composition

The Prime Minister. The President of Romania cannot appoint the Prime Minister; he can only designate a candidate for this function. Furthermore, the President can appoint the entire Cabinet only subsequent to the vote of confidence expressed by Parliament with regard to Cabinet as a whole. This appointment is a formal confirmation of the investiture granted by the legislature. In this respect, the appointment of the Cabinet by the Head of State, as well as the oath that all members of the Cabinet must take in front of him, represent circumscribed powers of the President. The President has, however, a certain margin of discretion in

[89] In its Ruling No. 1 of 2007 (*OJ* No. 258, 18 April 2007), the Constitutional Court validated the suspension of the President and rejected the challenge of the latter, since its previous opinion, considered to favour the President, was not binding upon Parliament, which is the only body to take such a decision. The Court also found that all conditions for the *ad interim* presidential function were met, therefore the Speaker of the Senate of Romania, Mr. Nicolae Văcăroiu became acting President for 30 days.

[90] In March 2007, the Parliament tried to amend the law on the referendum by adopting a change in the procedure according to which it would be impossible to hold any referendum six months before the ordinary parliamentary elections. The measure aimed at countering the initiative of the President who had announced his intention to call for a referendum on the change of the electoral system from proportional representation to a majority vote. The Constitutional Court declared this law unconstitutional (Decision No. 147 of 2007, *OJ* No. 162, 7 March 2007) in the framework of an *a priori* check, which made it non-operational. However, while the referendum on the dismissal of the President was being organised, the Parliament succeeded in passing another amendment to the law on the referendum, which essentially allowed for the calculation of the impeachment referendum outcome not based on the number of registered voters, but based on the votes cast. The Constitutional Court confirmed the constitutionality of this law (Decision No. 420 of 2007, *OJ* No. 295, 4 May 2007), which made the confirmation of the incumbent President possible, even though the turnout at the polls was 44.45%.

https://doi.org/10.1017/S1574019608000643 Published online by Cambridge University Press

choosing a candidate Prime Minister. He may freely choose among the powerful or weak political personalities available, whether represented in Parliament or not, but he may also purely and simply choose a technocrat. The Constitution compels the President only to hold consultations with the leaders of parliamentary parties, but not to observe the outcome of these consultations. When he proposes a candidate for the office of Prime Minister, the President compels the MPs to give an opinion on a choice already made, but the President cannot abuse his modest discretionary power in this matter, as he must keep in mind that the person he suggests must secure a vote of confidence. In this respect, the choice made by the President is limited by a concern for institutional efficiency.

Cabinet members. The President has no competence to choose other members of the Cabinet, as the decision lies completely with the designated Prime Minister. The candidates proposed by the designated Prime Minister are, in their turn, subject to the examination of the permanent committees of Parliament. Based on this test, the permanent committees will give favourable or negative opinions. There have been several cases of negative opinions, which have been followed up with new propositions. However, in practice, pre-election agreements or coalitions have succeeded in pushing forward political 'algorithms' for the distribution of governmental positions. All Governments after 1989 had to be made up of three or more political parties or groups. The political group representing persons belonging to the Hungarian minority (UDMR) has constantly designated members in the Government, according to the result of negotiations held after elections with the political party (parties) having the majority of seats in Parliament.

The vote of confidence granted by Parliament is the true test and filter for the governmental team, and the President does not have any role in this process. The permanent committees of Parliament test each candidate; then debates follow in the plenary of each House of Parliament; the majority of the MPs taking part in a joint session must approve the Government. Consequently, the appointment of the Government by the President is not based on the referral by the Prime Minister, but on the referral by the speakers of both Houses, and it constitutes the enforcement of Parliament's decision to endorse the Government programme and the complete list of Cabinet members. 'The constitutional obligation of the Head of State is based on the Parliamentary decision and must put it into practice.'[91] The President must issue appointment decrees for each member of the Government.

Cabinet appointment. As already mentioned, the appointment of the Government by the President is basically a power rigorously overseen by Parliament, which

[91] Decision No. 356 of 2007, published in the *OJ* No. 322, 14 May 2007.

https://doi.org/10.1017/S1574019608000643 Published online by Cambridge University Press

leaves little room for the Head of State. The best proof is that a vote of lack of confidence by Parliament entails the immediate resignation of the Government, and the President is not called upon to intervene.

Cabinet reshuffle. A Cabinet reshuffle and the appointment of new Cabinet members is not a free power of the President of Romania either. Since the responsibility for governmental activity belongs to the Cabinet *in solidum*, the right of the President to revoke and appoint new Cabinet members other than the Prime Minister cannot be interpreted as a right to *veto*. The President only takes action based on a proposal by the Prime Minister, who is the only one to bear the responsibility.

In fact, Article 85 distinguishes two different situations with respect to a Cabinet reshuffle: a simple reshuffle or a change in the political structure or make-up of the Government. In the first case, the President dismisses certain ministers and appoints successors, based on the Prime Minister's proposal. In the second case, he may conduct the same activities but only following the endorsement by Parliament of the proposition made by the Prime Minister. In this case the Prime Minister suggests not a mere reshuffle but a serious change in the composition of his/her Cabinet and Parliament has only to approve the new members of the Executive and not the entire team (again). There is no clear definition of 'change in the political structure or make-up of the Government'; in practice a new parliamentary vote was sought when there was a change in the structure of the Cabinet (i.e., creation of three positions of deputy-PM in order to pacify political struggles) or a political party declared it would resign from the Cabinet and positions of ministers previously held by representatives of that party had to be filled in with apolitical persons or representatives of one of the parties already in Government, etc. By virtue of Article 107 paragraph 2, as amended in 2003, the President may not dismiss the Prime Minister.

When a Minister resigns or is dismissed, the Prime Minister must suggest a successor whom the President must appoint. These two legal operations must take place no later than 45 days from the date when the ministerial position becomes vacant; during this time span the Prime Minister may appoint an interim Minister. The possibility of having an interim minister was added by the constitutional amendment of 2003 as a possible outcome of a political deadlock involving President and Prime Minister. In practice, this solution proved useful: in the spring of 2007, when the Foreign Office Minister position became vacant following the resignation of its holder, President Băsescu opposed the proposal made by the Prime Minister. The Prime Minister had to be an acting foreign minister himself until he eventually succeeded in imposing his choice.[92]

[92] *See supra*, n. 81.

https://doi.org/10.1017/S1574019608000643 Published online by Cambridge University Press

On referral by the Prime Minister, the Constitutional Court found that the President's refusal to appoint a Cabinet member proposed by the Prime Minister had launched a legal conflict of constitutional nature between the two heads of the executive branch, but the presidential decrees regarding the dismissal of the Foreign Office Minister and the appointment to this position of the person proposed by the Prime Minister and accepted by Parliament, respectively, solved this conflict. The conflict had ended because the president had finally accepted the proposal of the PM. The Court also stated that the President had the right to politically appraise the competence of a person proposed to become a member of the Cabinet, but had no decisional capacity in this matter.[93] Just as Parliament does not have the right to veto propositions made by the Prime Minister, but only to see whether the necessary conditions are met for a person to occupy a certain governmental position, the President does not have a right to veto nominations of the Prime Minister, but only to check whether the person fulfils legal requirements. On this basis, the President may require the Prime Minister to make another proposal. In any case, reasons must be given for the refusal of a candidate.

Influence of the President on Government activity

Optional consultation. Under Article 86 of the Constitution, the Head of State has the right to have consultations with the Government on 'urgent matters of particular importance'. As there is no clarification of this term, the President has the discretion to identify and define such matters. Given the broad scope of this constitutional provision, the President may, in fact, consult the Government at any time and on any matter he considers urgent, since 'importance' is a feature that is extremely subjective.

The Constitutional Court went farther and decided that not only does the President bear the sole responsibility concerning the kind of matters to be raised in optional consultations with Government, but he also decides on the format according to which such consultations should take place,[94] such as participation of the Head of State in the weekly meetings of the Cabinet (even if they focus on topics other than the ones the President declared important), letters sent to the Prime Minister or even consultations by telephone. In practice, there have been consultations with the entire Cabinet and with some of its members separately. However, all consultations with Cabinet members must have the Prime Minister as intermediary.

The doctrine has speculated on the optional nature of these consultations, inferring that even though the President has the right to have consultations, the

[93] Decision No. 356 of 2007, *OJ* No. 322, 14 May 2007.
[94] Advisory Opinion No. 1 of 2007, *OJ* No. 258, 18 April 2007.

https://doi.org/10.1017/S1574019608000643 Published online by Cambridge University Press

Government is not bound to react to the presidential demand.[95] However, the Government must organise a meeting if the President requires consultation, just as Parliament must meet in plenary for the delivery of the presidential message.

Optional participation. According to Article 87 of the Constitution, the President may take part in the meetings of the Government debating matters of national interest with regard to foreign policy, defence of the country or public order, and, at the Prime Minister's request, in other instances as well. The President chairs the governmental meetings in which he takes part.

Two different situations are imaginable: one situation presupposes the initiative of the Prime Minister, the other a presidential initiative. In the first case, regular rules regarding consultations between the Head of State and Government apply, namely, the President is not bound to respond to the request made by the Prime Minister, but if he decides to take part in such meetings, he must chair them, irrespective of their agendas. In the second case, it would be an illusion to imagine that the Government could refuse to let the President in. As to the definition of what could be 'matters of national concern on issues relating to foreign policy, defence of the country and public order', in a globalised world and in a Europe that is becoming more and more integrated, this is a question of discretion for the Head of State.

In theory, the President could participate in all governmental meetings without changing the institutional relationships within the Executive, because, even though he must preside at the meetings in which he takes part, the Head of State cannot change the agenda or participate in the governmental decisional process. The President does not become a member of the Government simply by exercising a right given to him in the Constitution; nor is he responsible for the decisions taken in a meeting in which he took part. This is a means made available to the President only to allow him to express himself in front of the collegiate body that provides 'flesh' to the executive power. As the Constitutional Court put it,

> the participation of the President in the meetings of the Government is, among other things, a way to consult with Government and to see to the good operation of this public authority, which are two of the prerogatives of the Head of State, provided for in Article 80 paragraph 2 and Article 86 of the Constitution. In exercising these prerogatives, the President has the freedom to participate in any Governmental meeting. The analysis of Article 87 of the Constitution does not reveal any possible ban on the President of Romania to participate in governmental meetings, but only his option to take part in those sessions focusing on matters of

[95] S. Deaconu, *A comment on Article 86 of the Constitution*, to be published (manuscript consulted with permission of the author).

https://doi.org/10.1017/S1574019608000643 Published online by Cambridge University Press

> national concern on issues relating to foreign policy, defence of the country or public order, or on other matters, if he is requested to do so by the Prime Minister.
> The peculiar feature of this presidential function is that if exercised, it does not change the constitutional relationship established between the President of Romania and Government. The President does not become a substitute Government; he cannot prevent the Cabinet to adopt the legal instruments that it wants to adopt and cannot bind it to adopt the measures it does not wish to take.[96]

Caught in the web of possibilities that the Constitution seems to offer and the additional requirements that condition the exercise of the majority of his functions, the President of Romania runs the risk of not knowing how to fulfil his role of Head of State without prejudicing the powers granted to other public authorities. All occupants of this high State position have demonstrated their activism, each in his own individual way; nobody sat on the sidelines. Presidents intervened more or less directly in political or institutional life and they have all used, with more or less creativity, the means made available to them by the Constitution. The presidential institution has never remained inert, in spite of limitations laid down in the constitutional text. But does that provide sufficient grounds to qualify the Romanian political system as semi-presidential?

A hard-to-qualify political system

It is difficult firmly to qualify the Romanian political system, since the mere facts that there is a directly elected Head of State and that the Prime Minister is accountable, together with his Government, to Parliament are not sufficient grounds to call it a semi-presidential system. To reach a conclusion, one should also take into account the real powers of the President, how he uses them in his relationship with Parliament and Government, his political affiliation and, more generally, his capacity to influence the political scene of the State.

The Constitution, in its initial version as well as in the one revised in 2003, establishes quite complex relationships between the President of Romania and all other public authorities; the practice is not uniform and sometimes difficult to discern. The outcome is a relatively unstable political situation, depending not only on the objective evolution of events, but also on the persons holding various State offices.

Based on a first glance at the constitutional text, in the early 90s the doctrine characterised the Romanian political system as semi-presidential with parliamen-

[96] Advisory Opinion No. 1 of 2007, mentioned above.

https://doi.org/10.1017/S1574019608000643 Published online by Cambridge University Press

tary tendencies[97] or mitigated semi-presidential.[98] Authors highlighted that, with the exception of the direct election of the Head of State, the features of the French political system – considered to be the prototype of all semi-presidential political systems – were adjusted in the Romanian case to provide for a decrease in presidential influence. Many powers are to be exercised either directly by the Government, or under the direct oversight of Parliament. If in France the political role of the President of the Republic is very important, in Romania his role is more restricted,[99] since all his major political powers are subject to *checks and balances*, which is a feature of parliamentary systems.[100] But even these authors rush to add that: 'this conclusion is based on the text of the Constitution, and not on the current situation, which is contrary to the Constitution.'[101]

True, in practice the President of Romania functions differently than the Constitution suggests: incumbents of this high State office have constantly interpreted the legal texts as to make them evolve towards presidentialism, whereas a number of political forces advocate a clear change in the system in favour of parliamentarism.[102] The gap between the constitutional and the real powers of the Romanian Head of State may provide an idea of how impossible it is to qualify the Romanian political system with certainty. Over time, Presidents of Romania have more and more interfered with the constitutional powers of Parliament in a way that is often on the edge of unconstitutionality, or have mingled with the decision-making power of Government or of the Prime Minister in areas where no clear distribution of competencies was ensured by the fundamental law. Not only a slightly bewildered political class, but even all of Romanian society slowly, gradually, but

[97] F. Vasilescu in *Constituția României – comentată și adnotată* (Bucharest, Regia Autonomă Monitorul Oficial publishing house 1992) p. 182.

[98] A. Iorgovan, *Tratat de drept administrativ*, Vol. I (Bucharest, ALL Beck publishing house 2005) p. 294.

[99] 'All features that make up the peculiarity of the French political regime are absent or considerably weakened in the Romanian text. Thus, the Romanian President lacks the essential prerogatives of the French regime, such as the adoption of laws by means of referenda and exceptional powers in crisis situations. Other functions are differently provided for, a fact that makes the Romanian President much weaker than his French counterpart: appointing and dismissing the Prime Minister are not free powers, but they rather depend on a parliamentary vote; the dissolution of the parliamentary assembly is a problem without any solution; the participation in the governmental meetings is completely different; the signature of legal documents is constantly subject to endorsement etc.' (T. Drăganu, *Drept constituțional și instituții politice. Tratat elementar*, Vol. II (Bucharest, Lumina LEX publishing house 1998) p. 230.

[100] A. Iorgovan, *Tratat de drept administrativ*, Vol. I (Bucharest, ALL Beck publishing house 2005) p. 295.

[101] Ibid.

[102] G. Vrabie, 'O posibilă revizuire a Constituției. Regim politic parlamentar în România postdecembristă?' [A Possible Revision of the Constitution? Parliamentary regime in post-December'89 Romania?], *Revista de Drept Public* 2007, p. 95 et seq.

https://doi.org/10.1017/S1574019608000643 Published online by Cambridge University Press

surely became accustomed to an open expansion of presidential attributions, at times beyond their constitutional limits, despite discrete reprimands imparted by the Constitutional Court.

The doctrine stated that, from the point of view of the institutional relationships established among the main State authorities, the peculiarity of the Romanian Constitution is that it does not create procedurally well-organised means for Government and President to take joint action, as parts of the same branch; in exchange, Government is sometimes 'a result of Parliament, a working committee of the latter, which the President may chair but cannot direct; at times it may also be a sort of a scapegoat meant to be the only probable victim of a potential two-giant confrontation: between Parliament and President.'[103] The forms and means to exercise State power also depend on the way in which their holders understand legal provisions, and particularly constitutional rules.[104]

Taking into account recent political developments in Romania, it is difficult to continue to speak of two chiefs of the executive branch; the role of State representation, fulfilled by the President both at the internal and international level, as well as recent institutional and political practice, seem to point towards a slightly different trend.[105] The Constitutional Court formulated this idea in a non-equivocal manner:

> the constitutional prerogatives, as well as the democratic legitimacy granted to the President of Romania by the very way in which he is elected, impose on him an active role. The functions of *oversight* and *guarantor* granted to the President by Article 80 of the Constitution mean that, by definition, he should attentively observe the existence and operation of the State, vigilantly monitor the *modus operandi* of actors in public life – public authorities, bodies legitimated by the Constitution, civil society – and constantly respect principles and rules laid down in the Constitution, as well as defend values established by the fundamental law. The functions of oversight and guarantor cannot be fulfilled in a passive manner, in a state of contemplation, but only by an active and live engagement.[106]

Most certainly, even if he does not possess particularly efficient tools to determine the policy of the country or if he is not able to decisively influence the operation

[103] Drăganu, *supra* n. 99, at p. 229-230.

[104] Vrabie, *supra* n. 37, at p. 398.

[105] What the majority of the political class holds against President Traian Băsescu is precisely the fact that he has kept promises made during the election campaign, namely to be a 'player President', and, consequently, to assume an active role in the political arena and to engage in all State activities. President Băsescu succeeded in stretching to the limits the image of a politically (hyper)active President, which could be considered as evidence of the constant strengthening of the position of President in the institutional architecture of the State.

[106] Advisory Opinion No. 1 of 2007, mentioned above.

https://doi.org/10.1017/S1574019608000643 Published online by Cambridge University Press

of Parliament or of the Government, the President of Romania is perfectly able to contribute to the shaping of the (legal) context in which they have to operate, *de jure* (e.g., by initiating a revision of the Constitution as in 2003 or referring parliamentary acts to the Constitutional Court as between 2005 and 2007) as well as *de facto*. The representation function seems to be the most important in comparison with all other functions of the executive branch, and that is why it gives to its holder a top position in the institutional architecture of the State. Be it during political cohabitation or periods of political identity between Parliament and President, the figure of the Head of State remains emblematic in terms of the exercise of power at State level. The current political structure of the main Romanian public authorities, where three distinct political currents dominate Parliament, Government and the Presidency respectively, is not likely to support the coherence of State action,[107] but is made entirely possible by the institutional web created by the Constitution. The ambiguity of the Romanian political system increases constantly in a politically unstable and, at times, even surprising environment; however, paradoxically, the position of the President of Romania only gains in importance and preponderance in the political and institutional arena. Is it enough to enable one to speak of a true slippery slope in the nature of the Romanian political system? Will it be possible, in the future, to characterise the system as purely presidential? The institutional practice of the second half of the current presidential term of office will surely provide an answer to all these questions.

[107] The relations between the President on the one side, and the Parliament, the Government and even the Higher Council of Magistrates, on the other side, deteriorated quickly after the elections of 2004, witness the case-law of the Constitutional Court, called upon more often lately to solve constitutional legal conflicts among State authorities. (Once in 2005 between the President of Romania and the speakers of the Houses of Parliament, once in 2006 between the President and the Higher Council of the Magistrates, and twice in 2007 between the President and the Parliament and the Government, respectively). The peak of this political crisis, which seems to be becoming permanent, occurred with the suspension procedure initiated in the spring of 2007.

https://doi.org/10.1017/S1574019608000643 Published online by Cambridge University Press